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No. 90-1506

# In the Supreme Court of the United States

OCTOBER TERM, 1990

KATHLEEN SHETLER GLOBUS, PETITIONER

*v.*

SAMUEL K. SKINNER, SECRETARY OF TRANSPORTATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the courts below correctly held that, in order to establish a violation of Title VII consisting of an allegedly retaliatory failure to offer her a position, petitioner was required to prove that there was an available position.

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## OPINIONS BELOW

The order of the court of appeals summarily affirming the district court's judgment (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-37a) is reported at 721 F. Supp. 329. The order of the district court denying petitioner's motion to alter judgment (Pet. App. 38a-43a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. A petition for rehearing was denied on November 30, 1990. Pet. App. 44a. On February 15, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 28, 1991. The

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Between 1967 and 1983, petitioner was an employee of the Maritime Administration (MarAd), ultimately in a GS-13 position. In the 1970s and early 1980s, petitioner was involved in a number of equal employment opportunity activities at MarAd, including a class action lawsuit alleging that MarAd discriminated on the basis of race and sex. Petitioner was deposed in the suit in 1981, and the plaintiffs listed her as a potential witness. Although she did not testify, she was perceived by some MarAd employees as an "instigator or ringleader of EEO activity at MarAd." Pet. App. 4a-5a.

As a result of budget cuts in the early 1980s, MarAd was forced to make substantial reductions in the number of its employees. In 1982, MarAd selected petitioner's position, among others, to be abolished in a reduction in force. The position was preserved, however, when another employee unexpectedly resigned. The following year, in another reduction in force, MarAd abolished petitioner's position. After exhausting her administrative remedies, petitioner filed suit, alleging that MarAd had violated Title VII, 42 U.S.C. 2000e-3(a), by discharging her in retaliation for her anti-discrimination activities. Pet. App. 6a-7a.

b. After a trial, the court found that petitioner had established a prima facie case of retaliation by showing "(1) that she engaged in protected activity; (2) that the employer took adverse action against her; and (3) that there is at least an inference of a causal connection between the two." Pet. App. 24a, 27a-30a. However, the court held that there was "no liability under Title VII" because MarAd had "articulated legitimate, nonretaliatory reasons for dismissing

[petitioner] in the 1983 RIF" and because she had "failed to prove that these reasons were pretextual." *Id.* at 30a, 37a. Based upon detailed findings of fact regarding the events that culminated in the decision to abolish petitioner's position, the court was "convinced that the nonretaliatory reasons given for the dismissal of [petitioner] were the true and only reasons for her dismissal." *Id.* at 32a. In passing, the court also rejected the claim that MarAd "showed retaliatory intent in 1983 by failing to offer [petitioner] a GS-6 typing job in lieu of dismissing her entirely." *Id.* at 21a, 35a-36a.

c. Petitioner filed a motion to alter judgment, arguing that MarAd "violated Title VII by failing to offer plaintiff a clerical position[] at GS level 6 upon the elimination of her GS 13 job." Pet. App. 39a. The district court rejected that new theory of liability on two alternative grounds.

First, the court concluded that petitioner "failed to present a prima facie case of retaliation with respect to her claim that defendants failed to offer her a GS 6 clerical vacancy" because there was "no evidence that such a clerical position was available." Pet. App. 40a. The court explained that, by contrast to petitioner's claim of retaliatory discharge, her claim of "improper failure to offer alternative employment in the midst of a bona fide reduction in force" required, for a prima facie case, a showing "that such a position was available." *Id.* at 40a n.1. To satisfy that burden, the court continued, petitioner relied only on "general testimony that one of the four clerical positions exempt from the 1983 RIF was vacant at the time of the plaintiff's termination," asking "the court to 'infer that [MarAd's] office had determined that that vacancy was going to be filled.'" *Id.* at 40a. Noting that petitioner had the "opportunity to develop direct testimony regarding the alleged vacancy at trial," the court declined to "'infer' an essential element of plaintiff's case after trial." *Id.* at 41a.

Second, the court also found that "even if [petitioner] had succeeded in establishing a prima facie case," she had "not proved that defendant's reasons for failing to offer [her] a clerical position were merely pretextual." Pet. App. 41a.

2. The court of appeals summarily affirmed. Pet. App. 1a-2a. It upheld "the district court's conclusion regarding the agency's failure to offer appellant a position in lieu of separation solely on the ground that appellant failed to establish a *prima facie* case concerning the availability of such a position." *Ibid.*

## ARGUMENT

Petitioner presented different theories of liability at trial and in her motion to alter judgment. At trial, the theory of petitioner's case was that MarAd abolished her position in the 1983 reduction in force in retaliation for her equal employment opportunity activities. In her motion to alter judgment, petitioner argued that MarAd's retaliation took the form of a failure to offer her a clerical position instead of terminating her employment altogether. The petition presents only the second claim. Pet. 9-10, 14 n.8. Petitioner's basic contention is that the district court and the court of appeals should not have required her to bear the burden of proving that there was an available vacancy. Pet. 41-42. There is no merit to that contention, and it presents no question warranting this Court's review.

1. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court established the order of proof in Title VII discrimination cases. The plaintiff has the initial "burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-253. In cases alleging discrimination in hiring,

the plaintiff "must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Id.* at 253. If the plaintiff makes out a prima facie case, then "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Ibid.* (quoting *McDonnell Douglas*, 411 U.S. at 802). Finally, if the defendant carries this burden, then the plaintiff must have "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253.

Although the *McDonnell Douglas/Burdine* framework was designed for claims that an employer has violated Title VII by engaging in invidious discrimination, the courts of appeals have adapted it to claims that an employer has retaliated against an employee because of protected equal employment activities. *E.g.*, *Williams* v. *Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *Yartzoff* v. *Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), cert. denied, 111 S. Ct. 345 (1990); *Jennings* v. *Tinley Park Community Consol. School Dist. No. 146*, 796 F.2d 962, 966-967 (7th Cir. 1986), cert. denied, 481 U.S. 1017 (1987); *Mitchell* v. *Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985).[1] The courts of appeals are in agreement that a prima facie case for a retaliation

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[1] Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

claim consists of proof that the plaintiff engaged in statutorily protected activity, that the employer took an adverse personnel action, and that there is some basis for inferring a causal connection between the plaintiff's activities and the employer's action. *Ibid.*

The precise showings required for a prima facie case depend on the nature of the allegedly unlawful personnel action. Obviously, if a plaintiff claims that the retaliation took the form of a failure to hire her or to place her in a particular position, the plaintiff cannot prove that she was the victim of an adverse personnel action without demonstrating that a vacancy existed.[2] Absent an available vacancy, there is no adverse personnel action. That is this case. Petitioner asked the court to find that MarAd had discriminated against her by failing to offer her a clerical vacancy. The court found, however, that "there [was] no evidence that such a clerical position was available." Pet. App. 40a. Thus, petitioner simply failed to prove the form of retaliation that she asserted in her motion to amend the judgment.[3]

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[2] Indeed, in cases in which alleged retaliation takes the form of a failure to hire or promote the plaintiff, the D.C. and Eleventh Circuits require the plaintiff to demonstrate "as part of the prima facie reprisal case that he was qualified for the position." *Mitchell* v. *Baldridge*, 759 F.2d 80, 86 n.5 (D.C. Cir. 1985); *Williams* v. *Boorstein*, 663 F.2d 109, 116 & n.43 (D.C. Cir. 1980), cert. denied, 451 U.S. 985 (1981); *Canino* v. *EEOC*, 707 F.2d 468, 471-472 (11th Cir. 1983).

[3] Petitioner relied on testimony that one of the clerical positions exempt from the reduction in force was not occupied. See Pet. App. 40a. Under the circumstances of this case, however, that evidence was insufficient to prove an *available* vacancy. Even assuming that an authorized position was empty, there was no showing that the agency had any intention of filling it. In *McDonnell Douglas*, this Court indicated that the prima facie case for a claim based upon a discriminatory failure to hire involved a showing that after the plaintiff was rejected, "the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications." 411 U.S. at 802.

2. Contrary to petitioner's contention (Pet. 30, 50-63), the standards applied to petitioner's claim are entirely consistent with the framework established in *McDonnell Douglas* and *Burdine*. With the exception of the motive for the alleged adverse personnel action, petitioner's claim is indistinguishable from a claim that an employer failed to offer a vacancy to a potential employee on the basis of race, sex, national origin, or religion. In the latter case, *McDonnell Douglas* and *Burdine* require a plaintiff to show that there was "an available position for which she was qualified." *Burdine*, 450 U.S. at 253. Accord *McDonnell Douglas*, 411 U.S. at 802. There is no reason why a plaintiff alleging that she was denied a position because of her equal opportunity activity (rather than because of her sex) should be relieved of the burden of making the same showing.

3. There is no conflict between the lower courts' decision in this case and decisions of other courts of appeals. The cases on which petitioner relies (see Pet. 39-40) do not suggest that a plaintiff may recover under Title VII for a retaliatory failure to hire without proving that there was an available position for which she was qualified. In fact, in *Gonzalez* v. *Carlin*, 907 F.2d 573, 578 (5th Cir. 1990), the court affirmed the denial of a claim alleging a retaliatory failure to promote the plaintiff to a particular position on the ground, among others, that the plaintiff had presented no evidence that he was qualified for the job and thus had failed to make out a prima facie case. In *Holland* v. *Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989), the court held that the plaintiff had produced sufficient evidence that her employer had retaliated against her by refusing to keep her job open during her maternity leave after having earlier promised to do so. The effect of the change was to terminate her from her position. As the district court's treatment of the theory petitioner advanced at trial reflects

(see Pet. App. 27a-30a), that type of claim does not require a showing of an available vacancy; the adverse personnel action consists of depriving the plaintiff of the job she already holds.[4] There is no support whatever for petitioner's assertion (Pet. 41) that, in a case involving an allegedly retaliatory failure to hire, "it is settled throughout most of the circuits that the issue * * * whether the vacancy she claimed was truly available * * * is considered as part of the employer's rebuttal rather than the plaintiff's prima facie case."[5]

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[4] Petitioner cites a number of cases for the proposition that "if a single personnel decision is attacked as both an act of discrimination and an act of reprisal, the two issues are analyzed using differing (and non-overlapping) prima facie cases." Pet. 40. Whatever the validity of that assertion, none of the cases suggest that a retaliatory failure to hire may be shown without evidence of the type petitioner failed to introduce here. Similarly, petitioner suggests that decisions of the Seventh and Ninth Circuits have imposed too high a burden of proof on plaintiffs alleging retaliation. Pet. 36, 43-46. We do not agree that the cases on which petitioner relies commit those circuits to standards at odds with those applied here. In any event, since the standards of which petitioner complains were not applied to her, they provide no support for further review.

[5] In any event, as the district court noted, even if petitioner were deemed to have established a prima facie case, she failed to prove that respondent's reasons for failing to offer her a clerical position were pretextual. See Pet. App. 41a.

## CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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